
ASSESSING THE BENEFITS OF STATUS INDIANS WORKING ON OR OFF THE RESERVE FOR SASKATCHEWAN BOARDS OF EDUCATION



 SASKATCHEWAN
School Boards
ASSOCIATION

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PURPOSE

This is a general discussion paper to create awareness amongst the members of the Saskatchewan School Boards Association (SSBA) about the income tax exemption of Status Indians. This paper will explore the history of the tax exempt status, why it was first put into law through the *Indian Act*, how it is being applied today and how it may have an impact on the recruitment of First Nations teachers and other staff by various school divisions within the province. A set of recommendations will conclude the paper.

Information was collected from documents from Indian and Northern Affairs Canada, the Federation of Saskatchewan Indian Nations (FSIN), the Canada Revenue Agency (CRA) and from interviews with key informants.

This paper is not meant to be a legal analysis of the income tax exemption of Status Indians nor a recommendation for future work in this area.





BASIS FOR TAX EXEMPTION OF STATUS INDIANS

The SSBA must be aware of the history of the tax exemption of Status Indians and its potential application in today's administrative framework.

TREATY POSITION OF FIRST NATIONS AND THE CROWN

The numbered Treaties (1-11) were signed between 1871 and 1921. The 74 First Nations in Saskatchewan belong, variously, to Treaties 4, 5, 6, 8 and 10. Only Treaty 8 speaks directly to a First Nations immunity from taxation by the Crown, as represented today by the Canadian and Saskatchewan governments, but the First Nations believe that it applies in all the numbered Treaties. The FSIN *Statement of Treaty Implementation Principles* of May 27, 2009, states:

Our Elders also tell us that we did not agree to give up the land...More particularly, First Nations only intended to share the topsoil to the depth of a plough. According to our Elders, this was because the white man asked us if they could use this soil for farming and we agreed.

In return the Crown undertook to provide assistance in a number of areas including: education, health and medicine, economic independence, hunting, fishing, trapping, gathering, annuities, agriculture, prohibition of liquor, exemption from taxes and conscription.

The First Nations believe that the Treaty immunity covers the entire Treaty area, both on and off-reserve, as well covering all forms of taxation, including GST, PST and income tax.

The Crown, as Treaty partner, does not recognize immunity from taxation as a Treaty right. The Crown believes the extent of the exemption is set out in the *Indian Act* and is confined to on-reserve residents and activities. The Courts ruled in favor of the Crown (Benoit 2004) in that Section 87 of the *Indian Act* and Section 81(1) (a) of the *Income Tax Act* define the parameters of the exemption. The income tax exemption for Status Indians is now guided by the following legislative framework.

SECTION 87 INDIAN ACT EXEMPTION

In 1850, *An Act for the Protection and Betterment of Indians in Upper Canada* prevented trespass and injury to lands reserved for Indians, provided exemption from taxation, blocked court judgments against personal property of Indians and outlawed the sale of liquor to Indians. The intent of the government was to prevent abuse of Indians and ensure security of Indian lands until such time as they became civilized or assimilated.

In 1876, this legislation became the *Indian Act* and was applied throughout Canada, including all Treaty areas. It continues to this day, with various amendments through the years.

The present day tax exemption is contained in Section 87 and Section 90 of the *Indian Act*:

s.87. (1) Notwithstanding any other Act of the Parliament of Canada, or any other Act of the legislature of a Province, but subject to section 83, the following property is exempt from taxation, namely:

- (a) the interest of an Indian or a Band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian, or Band situated on a reserve.

(2) No Indian or Band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph 1(a) or (b) or is otherwise subject to taxation in respect to any such property (underline added).

Section 90 provides:

s.90. (1) For the purposes of sections 87 and 89, personal property that was (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

Section 87 requires that the personal property of an Indian be “situated on a reserve” before it can qualify for an exemption from taxation. Section 90 appears to give some discretionary power to taxation authorities as we shall see later in the paper (*Folster v The Queen 1997*).

Until 1992, the residence of the employer or “residence of the debtor” was the primary factor that the Courts would consider when determining whether income earned by an Aboriginal person was “situated on a reserve” for the purposes of Section 87 of the *Indian Act*. If the employer was situated on the reserve, then the Status Indian employee was tax exempt, irrespective of the place and nature of the work carried out by the employee.

“CONNECTING FACTORS TEST”

In 1992, the Supreme Court of Canada adopted the “connecting factors test” in the case of *Williams v. Canada* for determining whether employment income is “situated on a reserve.” The “connecting factors test” requires that there must be “sufficient connecting factors” between the employment income and the reserve for the income to be considered “situate on a reserve” and thus eligible for exemption.

These connecting factors are:

- i. The person is an “Indian” as defined in the *Indian Act*;
- ii. The Status Indian lives on a “reserve” as defined in the *Indian Act*;
- iii. The Status Indian performs her/his employment duties on a reserve;
- iv. The Status Indian’s employer resides on a reserve; and
- v. The activity generating the income was intimately connected to the reserve or an integral part of reserve life.





CANADA REVENUE AGENCY POLICY ON EXEMPTION

In 1994, the CRA implemented a policy to conform to the Court decisions:

Employment income is exempt from income tax under paragraph 81(1) (a) of the Income Tax Act and section 87 of the Indian Act only if the income is situated on a reserve...

In 1992, the Supreme Court of Canada decided that all factors connecting income to a reserve must be examined in determining whether or not the income is situated on the reserve. To determine whether employment income is situated on a reserve, the courts follow the approach described in the decision called *Glenn Williams v. Canada*...

The CRA then set out the following guidelines for deciding whether the income is situated on a reserve:

When at least 90% of the duties of an employment are performed on a reserve, all of the income of an Indian from that employment will usually be exempt from income tax...

When the employer is resident on a reserve and the Indian lives on a reserve, all of the income of an Indian from an employment will usually be exempt from Income Tax...

When more than 50% of the duties of an employment are performed on a reserve; and the employer is resident on a reserve, or the Indian lives on a reserve, all of the income of an Indian from an employment will usually be exempt from income tax...

When the employer is resident on a reserve, and is: An Indian Band which has a reserve, or a tribal council representing one or more Indian Bands which have reserves; an Indian organization controlled by one or more such bands or tribal councils, if the organization is dedicated exclusively to the social, cultural, educational, or economic development of Indians who for the most part live on reserves; and, the duties of the employment are in connection with the employer's non-commercial activities carried on exclusively for the benefits of Indians who for the most part live on reserves. All of the income of an Indian from an employment will usually be exempt from income tax.

The application of this policy led to number of court actions by Aboriginals, including *Foldster v. Canada (1997)*, *Recalma v R (1998)*, *Southwind v Canada (1998)*, *Monias v. Canada (1999)*, *Amos v. Canada (1999)*, *Shilling v. Canada (1999; 2001, on appeal)*.

Two cases will be used to illustrate the application of Section 87 and 90 and the CRA policy:

vi. Monias

In *Monias v. Canada* (1999) the appellants were Status Indians who worked for an organization located off-reserve that was responsible for the welfare of Aboriginal children living on reserves. None of the appellants lived on reserves and most of the employment duties were performed in an off-reserve office. On appeal, the Court held that the income was not exempt from taxation under section 87 of the *Indian Act*. On application of the connecting factors test, the Court concluded that the benefits to Aboriginal children living on reserve from services provided by the appellants was outweighed by the fact that the appellants resided off-reserve and performed their employment duties off reserve.

Note: This case has parallels with a classroom teacher who is a Status Indian, employed in an off-reserve provincial school with a large number of Status Indian students, who may live on a reserve but performs all of the duties off-reserve and is paid through a school or division office which is off-reserve.

vii. Folster

In *Folster v. Canada* (1997) the Court considered whether income earned by a Status Indian at a hospital located off-reserve, but near reserve lands was exempt from taxation. The Government of Canada built the hospital and 80% of the patients were Indians. Funds for the Indians who used the hospital came from Health and Welfare Canada.

The Court held that Ms. Folster's earnings were deemed to be situated on a reserve pursuant to section 90(1) (a) of the *Indian Act*.

The *Folster* case appears to represent one of the rare exceptions to the general rule that the employer must reside on a reserve and the employee must perform all or most of his or her employment duties on a reserve.

While the various factors connecting the income to the reserve were considered in *Folster*, the case was decided on the basis of the deeming provisions in section 90(1)(a) rather than on application of the "connecting factors test."

Note: Section (90) of the Indian Act speaks to "Indian moneys or moneys... (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve."

Monies paid to school divisions through tuition agreements with the First Nations are given to the Band under the treaty right to education and, if used to pay Status Indian teachers, may not be subject to taxation. The researcher could not find any reference to this in court or CRA documents. It warrants a request for clarification to the CRA.





PRACTICAL APPLICATIONS

School divisions and First Nations are faced with a rapidly increasing student population of Status Indians at all grade levels and in all areas of the province. One inner-city school in Regina has an enrolment that is 98 percent Aboriginal. Balcarres Community School has an Aboriginal enrollment of 65 percent while Punnichy School has an enrollment of 90 percent Aboriginal. Many other schools across the province have varying numbers of Aboriginal students.

Concurrently, there is a marked shortage of First Nation classroom teachers and administrators in off-reserve schools, whether they are in larger cities with a large Aboriginal population or in smaller centers that serve surrounding First Nations. These are situations where the issue of tax exemption for Status Indians may have an impact on staffing and programming.

There is no doubt that there is a legislated entitlement for Status Indians to an exemption from paying taxes on income earned, providing they meet all or some of the connecting factors. SSBA members have been working with partners or individual employees to ensure that the Status Indian employee receives the entitlement within this legislative framework.

PARTNERSHIPS

One example where there has been an attempt to have the tax exemption legislation and connecting factors work is the Regina Public School Division (RPSD). The RPSD has an Elder-in-Residence Program and the Elders Advisory Council to the Board. The Elders are taxable on most of their earnings. The Board has proposed an arrangement to the First Nations University of Canada, an institution where Status Indian employees are tax exempt. The Elders' services would be provided through the University by contract, thereby ensuring that the Elders are tax exempt. Discussions are ongoing.

Administrators from the RPSD continue to work towards an effective partnership with the First Nations organizations within the city. There has been a MOU between the RPSD and the Five Hills Qu'Appelle Tribal Council to work cooperatively with the Regina Treaty and Status Indian Services (RTSIS), the Tribal Council affiliate, to provide effective in-school programs. Senior administrators from the RPSD have directed line staff to continue and expand these efforts.

A second example of a partnership is the agreement between the Lac La Ronge First Nation and the Northern Lights School Division (NLSD). Under agreement, the NLSD transfers funds to the First Nation, who in turn hires classroom teachers for the special classes on language, culture or "Treaties in the Classroom." Some of these teachers have previously been employed by the school division and now are entitled to income tax exemption because their employer is now the First Nation.

A third example of a partnership is that of the Battlefords First Nations Joint Board of Education, which is a partnership between the Light of Christ School Division, Living Sky School Division and the Battleford Tribal Council. The partnership's main office is located on reserve, so that at least one Status Indian employee is income tax exempt.

These are examples of partnerships that have been developed between the school divisions and First Nations or their representative organizations throughout the province. More information on partnerships is available from the SSBA, the Ministries of Education and First Nations and Metis Relations, and individual First Nations.

INDIVIDUAL EMPLOYEES

There are Status Indians who are currently working with school divisions in the province whose incomes are tax exempt. There are two ways to do this under current legislative and policy frameworks, either through individual application to CRA or through contracts, as discussed in the partnership section above.

The first way is by direct application of the connecting factors to the particular job situation. Assume for the moment that an employee has been hired by the school division to provide support for students from surrounding reserves. If the employee is a Status Indian who lives on the reserve, who does most of his work on the reserve in an educational program that is integral to the students from the reserve, then the employee's income will most likely be tax exempt. The fact that the individual is paid by the school division and has an office in the division headquarters may not be seen as outweighing the practical application of the other connecting factors.

The employee must then work with the employer in meeting the administrative requirements of the CRA for tax exemption, as set out in the CRA policy. The employer would have to provide the job description and list of duties that fulfill the connecting factors to the reserve(s). The employee would have to provide proof of Indian Status to the employer.

Both parties would then collaborate in filling out the CRA Form TD1-IN (06) *Determination of Exemption of a Status Indian's Employment Income*. If the document is acceptable to the CRA, then a decision will be made if the exemption is done at the school division office or if the income tax is deducted and reimbursed upon application at the end of the taxation year.

The second way is by direct contract between the school division and a First Nation, Tribal Council or tax-exempt institution such as the First Nations University of Canada or RTSIS. This could happen if an employee is a Status Indian, the services provided are for Status Indian students and the employee spends a significant amount of time in the community. The school division would transfer funds to the First Nation, Tribal Council or institution to administer on behalf of the school division.

This arrangement has satisfied the CRA that the connecting factors test has been met, even if the employee does not live on-reserve.

This type of contract arrangement, whereby a Status Indian employee's income is tax exempt, is working at the Balcarres Community School because of the partnership between Little Black Bear's Band and the Prairie Valley School Division.





A third way that has been discussed, but not implemented, is the setting up of school division offices on reserve in areas where there are high concentrations of First Nation school children that are attending off-reserve schools. The Battleford Tribal Council agreement with the surrounding school divisions is a variation of this arrangement, although only one Status Indian employee, who is not a classroom teacher, is income tax exempt.

This is becoming more of a viable option in large centers that have urban reserves or that are served by Tribal Council entities whose Status Indian employees are already tax exempt, such as RTSIS. This is beyond the scope of this paper but is something that should be kept in mind for the future.

RELATIVE IMPORTANCE OF THE TAX EXEMPTION TO PROFESSIONAL TEACHERS

There may be a significant difference in how the work of a teacher in a classroom is treated from the way an administrative or student support employee in the field is viewed by the CRA when deciding if the employee is exempt from paying income tax.

A Status Indian that is teaching in a classroom in an off-reserve school, and not spending any time in the reserve community as part of the job, will find it more difficult to find support for income tax exempt status.

In fact, a teacher may be drawn to a school system because there are high standards of excellence in its programming, salaries and benefits are commensurate with the provincial standard, job security, and there is a sound governance and support system and a host of other factors that influence such a decision. The factors involving the quality of the work place may trump the tax exemption as the deciding factor in accepting employment.

Many First Nation professionals are second and third generation urban Indians. These people have lived off the reserve all of their lives and no longer have the close, emotional ties to the community that characterized their parents and grandparents. In fact, there are those who may prefer to pay taxes and live in the urban centers in order to take advantage of opportunities for themselves and their children that may not be available on-reserve.

There was no opportunity to explore this avenue further. In the absence of quantitative and qualitative data, it is fair to say that the tax exemption is not as important to First Nations as it was 10 and 15 years ago. It is something that is good to have but it is no longer as important as a factor in the employee's selection of a professional teaching position.

IMPACT ON STAFF RELATIONS

One would hope that the personnel and payment records of individual staff are strictly confidential. However, there may be some resentment from non-Aboriginal staff if they perceive the Status Indians as receiving a tax exemption as special treatment and not as a right that is legislated. The appropriate way to mitigate such resentment is through awareness sessions and staff development.

A companion paper goes into that area at some length and the issue is simply highlighted for consideration.

CONCLUSION

Tax exemption, whether seen as a Treaty right or a legislated entitlement, can be an asset in recruiting Status Indian staff. If it is indeed a deciding factor in the decision to accept a position, the legislative and policy framework is in place that will help to administer the process.

School divisions across the province have had some experience with the application of the connecting factors and with contracting with First Nations to meet the standards set by the courts and the CRA. At the end of the day, as always, it becomes the choice of the individual employer and employee.

It is recommended that the SSBA receive a presentation from the CRA, as well as from Status Indian employees through their network, on the application of the policy framework and connecting factors.





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